IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs, April 17, 2008

CRYSTYNA BROOKE SAUNDERS v. JEREMY STEPHEN SAUNDERS, SR., v. STEPHEN JEFFREY SAUNDERS, and wife MARY THERESE SAUNDERS, v. LEONARD HENLEY, and wife JEANNIE HENLEY, v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Hamilton County
No. 99D2395 Hon. Jacqueline E. Schulten, Circuit Judge

No. E2007-01544-COA-R3-CV - FILED MAY 14, 2008

The paternal grandparents have appealed the ruling of the Trial Court denying them visitation, on the grounds that the Court had previously ordered visitation for these grandparents, and that order was res judicata and could not be altered by the Trial Court. On appeal, we affirm the Trial Court's ruling.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

John R. Meldorf, III, Hixson, Tennessee, for the lst Intervening Petitioners, Stephen Jeffrey Saunders, and wife Mary Therese Saunders.

OPINION

Background

This action originated when a Divorce Complaint was filed on November 18, 1999. One child was born to the marriage in October 1999. The parties were divorced, and given shared parenting of the child. The mother's parents were allowed to intervene, and were named as residential parents so long as the mother was living with the parents.

Later, the Trial Court dismissed the grandparents from the action, finding that the mother's mental health and the father's physical health were such that they could "fully assume all responsibilities for parenting this child." The Court adopted the parenting plan submitted by the father, wherein the mother was given primary residential custody, with the father having visitation every week from Sunday morning to Tuesday evening, and one Saturday overnight per month. The parties were ordered to attend counseling/mediation sessions.

Later, the Court entered an Order, reciting the parties had been attending mediation and counseling, but little progress had been made toward resolving their "seething anger", and the Court then appointed a guardian ad litem for the child, and ordered continued counseling for the parents.

Subsequently, the Court entered an Order finding that the mother was in the hospital in serious condition, and granting the father temporary residential custody of the child until the mother was released. The Court further ordered that the parties undergo a parenting evaluation by Dr. William Hillner.

At that point, the paternal grandparents, Stephen and Mary Saunders, sought to intervene, and the Court granted intervention.

The Court held a hearing on July 11, 2005, and changed primary residential custody from the mother to the father. The intervening paternal grandparents were given one weekend per month visitation, and first right of refusal for child care duties. The mother was given visitation every other weekend, plus three weeks in the summer.

Later, the father filed a Motion to Suspend Visitation, stating that the mother had moved out of her former home and that her relationship with her family had deteriorated to the point that they no longer helped her with the child. The Court then entered an Order suspending the mother's visitation due to her erratic behavior. Numerous motions were filed and the Court held a hearing on the pending motions, and found that the grandparent visitation statute was constitutional, and denied the maternal grandparents' motion for visitation, finding that the bond between the child and the maternal grandparents was not substantial enough to warrant a "forced relationship". The Court found the father was no longer estranged from his parents, so the Court did not have to decide whether the paternal grandparents should have court-ordered visitation.

The paternal grandparents filed a Motion to Alter or Amend, stating that the Court had granted them visitation in November 2005, and that Order was final. Thus, the grandparents asked the Court to modify its Order which appeared to terminate their visitation rights. The Court entered an Order Denying Motion to Alter or Amend, and the paternal grandparents have appealed.

The issue presented is:

Whether the Court erred in setting aside a "final order" from which no appeal was

sought and where there were no pleadings or requests before the Court to alter that order?

The grandparent visitation statute, Tenn. Code Ann. §36-6-306, states:

(a) Any of the following circumstances, when presented in a petition for grandparent visitation to the circuit, chancery, general sessions courts with domestic relations jurisdiction or juvenile court in matters involving children born out of wedlock of the county in which the petitioned child currently resides, necessitates a hearing if such grandparent visitation is opposed by the custodial parent or parents:

(1) The father or mother of an unmarried minor child is deceased;

(2) The child's father or mother are divorced, legally separated, or were never married to each other;

* * *

(b)(1) In considering a petition for grandparent visitation, the court shall first determine the presence of a danger of substantial harm to the child. Such finding of substantial harm may be based upon cessation of the relationship between an unmarried minor child and the child's grandparent if the court determines, upon proper proof, that:

(A) The child had such a significant existing relationship with the grandparent that loss of the relationship is likely to occasion severe emotional harm to the child;

(B) The grandparent functioned as a primary caregiver such that cessation of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm; or

(C) The child had a significant existing relationship with the grandparent and loss of the relationship presents the danger of other direct and substantial harm to the child.

(2) For purposes of this section, a grandparent shall be deemed to have a significant existing relationship with a grandchild if:

(A) The child resided with the grandparent for at least six (6) consecutive months;

(B) The grandparent was a full-time caretaker of the child for a period of not less than six (6) consecutive months; or

(C) The grandparent had frequent visitation with the child who is the subject of the suit for a period of not less than one (1) year.

(3) A grandparent is not required to present the testimony or affidavit of an expert witness in order to establish a significant existing relationship with a grandchild or that the loss of the relationship is likely to occasion severe emotional harm to the child. Instead, the court shall consider whether the facts of the particular case would lead a reasonable person to believe that there is a significant existing relationship between the grandparent and grandchild or that the loss of the relationship is likely to occasion severe emotional harm to the child.

(c) Upon an initial finding of danger of substantial harm to the child, the court shall then determine whether grandparent visitation would be in the best interests of the child based upon the factors in § 36-6-307. Upon such determination, reasonable visitation may be ordered.

The paternal grandparents were initially awarded visitation with the child in November 2005, when the Court found that:

1) the parents were divorced;

2) that the child and the paternal grandparents had a significant relationship for at least twelve months prior to the severance of said relationship in August 2004;

3) that the severance was caused by one of the parents, and did not include abuse or risk of harm to the child;

4) that severance of the relationship would likely cause severe emotional harm to the child;

5) that the best interests of the child mandated visitation for the paternal grandparents.

This Order was changed by the Court's Order of April 24, 2007, wherein the Court found that the father had been estranged from his parents, which was the basis for the Court ordering visitation for the father's parents, but by the time of the March 2007 hearing, such was no longer the case, and the Court stated that it was not "necessary to make findings and conclusions as to whether the paternal grandparents should have court ordered visitation due to the apparent resolution of the conflict between Father and his parents."

On appeal, the paternal grandparents argue the Court was in error, because there was no appeal from the prior order. It is well-settled, however, that "the jurisdiction of the . . . court over

the custody and support of the minor children of the parties to a divorce action continues and the decree may, in those respects, be changed or modified as the exigencies of the case may require." *State ex rel. Baker v. Turner,* 562 S.W.2d 435, 437 (Tenn. Ct. App. 1977); Tenn. Code Ann. §36-6-101. As we have stated:

> Custody and visitation decisions, once made and implemented, are res judicata upon the facts in existence or reasonably foreseeable when the decision was made. They may, however, be altered if intervening, material changes in the child's circumstances require modifying an existing custody or visitation arrangement. Accordingly, Tenn. Code Ann. § 36-6-101(a)(1) (Supp.1998) empowers the courts to change custody "as the exigencies of the case may require."

Solima v. Solima, 7 S.W.3d 30, 33 (Tenn. Ct. App. 1998)(citations omitted). Thus, while there must be a showing of changes in the child's circumstances to warrant a modification, a custody/visitation order is not "final" in the sense that it is non-modifiable, as intervenors insist.

In this case, the Trial Court found that there were no longer grounds for awarding visitation to the paternal grandparents, because the father was no longer estranged from them. We do not have a transcript of the evidence before us, so this Court must assume that the Trial Court's factual findings were supported by the evidence. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). Since the Trial Court found that the basis for the initial award of visitation to the paternal grandparents no longer existed, the court ordered visitation by the grandparents was no longer warranted, and we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Stephen Jeffrey Saunders and wife, Mary Therese Saunders.

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HERSCHEL PICKENS FRANKS, P.J.